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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

PEDRO BERNARDINO et al.,	C056338
Plaintiffs and Appellants,	(Super. Ct. No.
v.	CV025356)
VINEYARD PROPERTIES CORPORATION,	
Defendant and Respondent.	

Plaintiffs appeal from summary judgment rendered against them on their complaint of unlawful employment discrimination based on age in violation of the state Fair Employment and Housing Act. Undisputed evidence established that plaintiffs failed to file their required administrative complaint within the time mandated by statute. We thus affirm the judgment against them.

FACTS

Defendant Vineyard Properties Corporation (VPC) managed a vineyard. It employed plaintiffs to work on its property.¹

¹ The plaintiffs are Pedro Bernardino, Angela Cano, Graciela Cazares, Jose Estrella, Elida Mendez, Antonio Paniagua, Juana

In 2002, the property where plaintiffs worked was sold. As a result, VPC no longer had a need to employ farm workers. It determined to terminate all of the farm workers it had employed, including plaintiffs. VPC terminated their employment on July 31, 2002.

As a courtesy to plaintiffs and all of its terminated employees, VPC requested defendant Mid-Valley Labor Services, Inc. (Mid-Valley), a farm labor contractor, to consider hiring plaintiffs. Mid-Valley contracts with growers to provide laborers based on the grower's requirements.

Mid-Valley hired plaintiffs effective August 1, 2002. On that day, plaintiffs and their coworkers filled out new-hire paperwork. They received Mid-Valley employee identification numbers and identification cards.

Mid-Valley also entered into a contract with the new owner of the property where plaintiffs had worked, The Wine Group, allegedly the parent company of VPC, to provide labor to VPC's former vineyard. The Wine Group requested Mid-Valley assign the same number of workers for the site as had worked there under VPC. Mid-Valley assigned plaintiffs to continue working at the site.

Eventually, The Wine Group notified Mid-Valley that the site no longer required the services of all of the employees Mid-Valley had assigned to it. Mid-Valley selected 11 workers

Paniagua, Francisco Pasillas, Andres Rangel, Blas Valdes, David Valdes, and Ana Catalina Vargas.

to continue working at the site, all of whom were over the age of 40. Plaintiffs were not selected to continue working there.

Mid-Valley gave plaintiffs new assignments. However, none of them reported to their new work sites. Nevertheless, Mid-Valley never terminated them. At all times, plaintiffs have been registered as Mid-Valley employees.

PROCEDURAL HISTORY

Plaintiffs filed an administrative complaint with the state Department of Fair Employment and Housing (DFEH) on June 7, 2004. They subsequently filed this action against VPC and Mid-Valley, alleging one count under the Fair Employment and Housing Act (FEHA) of unlawful employment discrimination based on age. (Gov. Code, § 12940.)² They asserted VPC conspired with Mid-Valley for the purpose of replacing them with younger workers. They did not name The Wine Group as a party.

VPC moved for summary judgment. VPC claimed plaintiffs' legal complaint was time barred because they failed to file their administrative complaint with DFEH within a year of their dismissal by VPC, as required by FEHA. (See § 12960, subd. (d).) VPC also claimed plaintiffs had produced no evidence establishing even a prima facie case of discrimination.³

² Subsequent undesignated section references are to the Government Code.

³ Mid-Valley also filed a motion for summary judgment. However, plaintiffs dismissed Mid-Valley from this appeal.

Opposing the motion, plaintiffs claimed discovery indicated that VPC and The Wine Group were alter-egos, and that VPC did not properly notify plaintiffs that their employment with VPC ended on July 31, 2002. Plaintiffs sought additional time to conduct discovery on their alter-ego theory.

For evidence, plaintiffs submitted a request for judicial notice, asking the court to take judicial notice of four plaintiffs' deposition transcripts. They also submitted a declaration of Frederick Gundran, a private investigator, who testified as to his computer research into the corporate structure and membership of VPC and the Wine Group. And they submitted a declaration by Howard Rosenberg, a purported expert in labor management, who opined after reading plaintiffs' depositions that it was possible plaintiffs misunderstood the 2002 change in employment status to be in paycheck service only.

VPC objected to plaintiffs' request for judicial notice and to the Gundran and Rosenberg declarations. It claimed deposition transcripts were not the proper subject of judicial notice. It claimed the Gundran declaration was irrelevant, as information relating to The Wine Group was not relevant to plaintiffs' accusations. It also claimed Rosenberg's declaration was improper opinion.

The trial court granted plaintiffs additional time to conduct discovery about the alleged alter-ego relationship between VPC and The Wine Group.

Subsequently, plaintiffs filed an amended opposition alleging disputed facts showed VPC was the alter-ego of The Wine

Group and that The Wine Group used the land purchase as an excuse to hire younger workers via its contract with Mid-Valley. They also argued that disputed facts showed they reasonably believed they had not been terminated by VPC in 2002, and that they were in fact not terminated until more than a year later.

Plaintiffs submitted more deposition transcripts, including those previously attached to the motion for judicial notice, under cover of a declaration by their attorney. Counsel stated the copies were "true and correct copies of the originals[.]" Counsel did not assert he attended the depositions nor did he vouch for the transcripts' accuracy. The copies of the transcripts also did not include court reporters' certifications.

VPC again objected to plaintiffs' evidence. It claimed, among other objections, that the deposition transcripts could not be admitted under counsel's declaration because counsel failed to authenticate the accuracy of the transcripts. It objected to any evidence regarding The Wine Group as irrelevant to the accusations made in the complaint.⁴ It also objected to other declarations and documents submitted by plaintiffs.

At the hearing on the motion, the trial court addressed the authentication issue. It asked plaintiffs' counsel if he was

⁴ Plaintiffs submitted many of the same deposition transcripts under a declaration by counsel in response to Mid-Valley's motion for summary judgment. In this declaration, counsel stated the exhibits were true and correct copies, and that he had conducted the depositions.

present at his clients' depositions. Counsel said he was and that he had heard their testimony. The court asked if he knew that what was in the transcripts was a true and correct copy of what he heard. Counsel said it was: "The content of the depositions is true and correct." He then said, "Well, for the record, I was present at the depositions that were taken of the witnesses that were used as exhibits in this case."

The trial court granted VPC's motion for summary judgment. It concluded plaintiffs had filed their administrative complaint with DFEH in an untimely manner. It also determined that plaintiffs had not established a triable issue of fact that VPC was the alter-ego of The Wine Group or that plaintiffs' employment by Mid-Valley was somehow employment by either VPC or The Wine Group.

The court denied plaintiffs' request for judicial notice, and it sustained VPC's objections to plaintiffs' deposition transcripts for lack of foundation and authentication. It ruled truth of statements in deposition transcripts is not subject to judicial notice. Also, plaintiffs' counsel's declaration contained nothing to establish, and there was no reporter certification to establish, that the deposition excerpts accurately reflected the testimony provided by the proponents.

The court also sustained VPC's objections to the Gundran and Rosenberg declarations. Gundran's declaration was inadmissible hearsay, and Rosenberg's declaration was not admissible as an expert opinion. The court denied VPC's remaining objections.

Plaintiffs appeal. They claim (1) the court applied the wrong legal standard in determining when the one-year statute of limitations began to run; and (2) the court erred in refusing to admit their deposition testimony and the Gundran and Rosenberg declarations because that evidence established triable issues of fact showing plaintiffs actually remained employed by VPC through its alleged alter-ego, The Wine Group.

DISCUSSION

I

Standard of Review

A trial court will grant summary judgment where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment must prove the action has no merit. He does this by showing one or more elements of plaintiff's cause of action cannot be established or that he has a complete defense to the cause of action. At this point, plaintiff bears the burden of showing a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subds. (c), (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 849-850.)

II

Statute of Limitations

Plaintiffs' claim is barred under FEHA's one-year limitation. FEHA requires an employee to file an administrative complaint with DFEH within one year of the date on which the unlawful discrimination occurred. (§ 12960, subd. (d); *Romano*

v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479, 492

(*Romano*).) The failure to comply with this requirement bars the employee from suing the employer under FEHA. (*Ibid.*)

Plaintiffs acknowledge they did not file their administrative complaint within one year of their termination by VPC. However, they argue their action should not have accrued from when they were terminated, but instead from when they first understood they had been terminated. Both statute and case law defeat this argument.

First, FEHA does not extend the limitations period beyond one year except in limited circumstances, none of which apply here. The closest exception, section 12960, subdivision (d)(1), extends the one-year period for no more than 90 days following the year's expiration if the employee first obtained knowledge of the discrimination more than one year after the discrimination occurred. This statute extended the time for plaintiffs to file their administrative complaint to no later than October 30, 2003. Plaintiffs filed their complaint in June 2004.

Plaintiffs claim another exception applies. This exception, section 12960, subdivision (d)(2), extends the limitations period to one year "following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer." This exception does not apply in this case because the mentioned presumption is to be rebutted by the alleged

employer, not the aggrieved employee. The one-year period is extended if the employer rebuts the presumption so that the plaintiff has time to discover and name the true employer. This provision would not extend the time for plaintiffs to file against VPC when they already named VPC as their employer.

Second, case law also defeats plaintiffs' argument. Plaintiffs correctly assert the Supreme Court's holding in *Romano, supra*, 14 Cal.4th 479, prevents the statute of limitations from running until the time when the employee actually ceases working for the employer. But plaintiffs then incorrectly assert the holding means the one-year period did not begin to run as to the VPC case until plaintiffs were actually dismissed from the worksite by Mid-Valley in 2003 where VPC allegedly led plaintiffs to believe they were still employed by VPC until that time, and VPC and The Wine Group allegedly were alter-egos.

The undisputed evidence shows VPC terminated plaintiffs in July 2002. Plaintiffs' evidence attempting to challenge this date by means of what plaintiffs understood the date to mean, what they reasonably could have understood the date to mean, or what the relationship was between VPC and The Wine Group then or in 2003 was not admitted, and for good reason. Plaintiffs' deposition transcripts were never authenticated. Counsel's attempt to do so at trial failed because he did not attest to the accuracy of the transcriptions, and he did not testify under oath. Even though he may have attended the depositions, he or someone with personal knowledge still had to state under oath

that the transcriptions accurately recorded what the proponents had said. That did not happen here.

The Gundran and Rosenberg declarations were also correctly excluded. Gundran's declaration consisted of inadmissible hearsay, and Rosenberg attempted to give an expert opinion where none was required to understand the issue.

Thus, under the state of the evidence here, the *Romano* holding actually works against plaintiffs. In that case, the plaintiff learned his employer intended to terminate his employment in roughly two-and-a-half years, and it asked him to complete a teaching fellowship for much of the remainder of his time with the company and then to retire at the age of approximately 59 years. After retiring, the plaintiff filed an administrative complaint with DFEH, and he eventually sued the employer on various grounds, including a claim under FEHA for his being unlawfully discharged because of his age. (*Romano, supra*, 14 Cal.4th at pp. 484-485.)

The employer claimed plaintiff's FEHA claim was barred because he failed to file his administrative complaint with DFEH within one year of being informed that he would be terminated some two years later. The Supreme Court disagreed. The unlawful employment practice was the discharge, and the discharge occurred when the plaintiff actually retired, not the earlier date where he was informed he would have to retire two years into the future. (*Romano, supra*, 14 Cal.4th at pp. 492-493.) The case established the rule that the FEHA statute of

limitations begins to run at the time of termination. (*Id.* at p. 500.)

Here, VPC terminated plaintiffs in July 2002. The following day, plaintiffs became employees of Mid-Valley. Any claim plaintiffs may have had under FEHA against VPC for its action accrued that day according to *Romano*, and plaintiffs had until July 2003, or possibly October 2003 at the latest under the 90-day extension pursuant to section 12960, subdivision (d)(1), to file their administrative complaint with DFEH. Plaintiffs filed their complaint untimely. Summary judgment thus was appropriately granted in VPC's favor.⁵

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant, VPC. (Cal. Rules of Court, rule 8.278(a).)

_____, NICHOLSON, Acting P. J.

We concur:

_____, BUTZ, J.

_____, CANTIL-SAKAUYE, J.

⁵ VPC asks us to declare this appeal to be frivolous and to award attorney fees as a sanction. We deny the request. We cannot say that any reasonable person would agree that this appeal was so totally and completely devoid of merit as to be frivolous. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650.)